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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 289

DAVID V. LANSDEN, ET AL., PETITIONERS

v.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS HART, MARTIN, AND SJOSTROM IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (R. 55-59) is not reported. The opinion of the circuit court of appeals (R. 83-87) is reported in 168 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1948 (R. 87-88). Petition for rehearing was denied June 23, 1948 (R. 107). The petition for

a writ of certiorari was filed on September 21, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254.

QUESTION PRESENTED

Whether the Migratory Bird Treaty Act authorized the prohibition of hunting geese in an area of some 20,000 acres adjacent to a State Game preserve.

STATUTE INVOLVED

The Migratory Bird Treaty Act of July 3, 1918, Sec. 3, 40 Stat. 755, as amended, 16 U. S. C. sec. 704, provides:

> Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

STATEMENT

This action was brought to enjoin various officials of the Federal and State governments from enforcing certain regulations relating to migratory birds. The complaint was filed on November 6, 1947 (R. 3). A preliminary injunction was sought and a hearing was held on November 13, 1947. On the same day a motion to dismiss was filed (R. 23-24). At the conclusion of the hearing, the trial court rendered its opinion stating the reasons for the denial of the plaintiffs' motion for a preliminary injunction (R. 55-59), and an order denying the motion was entered the same day (R. 64-65).

The facts as they appear from the pleadings, the stipulations of the parties and the findings of the trial court may be summarized as follows:

A game preserve has been established by the State of Illinois at Horse Shoe Lake in Alexander County. On October 1, 1947, the President, pursuant to the Migratory Bird Treaty Act of July 3, 1918, as amended, 16 U. S. C. secs. 703-711, signed Proclamation 2748, 12 F.R. 6521, which prohibited hunting of all species of wild geese in a designated area surrounding the Horse Shoe Lake preserve. At the same time, a similar proclamation was signed by the Governor of Illinois. The various plaintiffs own or lease farms included within the closed area upon which hunting clubs are operated or hunting facilities are leased (R. 6-11).

The theory of the complaint was that Procla-

mation 2748 and the proclamation of the Governor of Illinois were invalid and that the plaintiffs would be irreparably damaged by enforcement thereof (R. 15-17). The federal officials named as defendants were William W. Hart, United States Attorney, and John M. Martin and Rae O. Sjostrom, both of whom are game management agents of the Fish and Wildlife Service of the Department of the Interior. The claims of invalidity of Proclamation 2748 were of two types: first, that it was arbitrary and capricious and not in accord with the Migratory Bird Treaty Act (R. 16), and second, that the procedure by which it was adopted did not conform to the Administrative Procedure Act and the Federal Register Act (R. 15-16).

The evidence taken at the hearing related to the circumstances under which Proclamation 2748 was issued, the hearings had in that connection and similar matters. The court found the facts to be as follows:

Prior to September 19, 1947, many conferences and hearings were held relating to migratory waterfowl, including geese, and "in particular with respect to the concentration of such geese" near Horse Shoe Lake. On September 19, 1947, a notice was published in the Federal Register of an intention to adopt an amendment to the regulations which would prohibit the hunting of geese in the vicinity of Horse Shoe Lake after November 3,

1947. Prior to September 30, 1947, a petition was presented by an attorney representing some of the plaintiffs, setting forth their views concerning regulations as to geese in Alexander County. On September 30, 1947, an additional hearing was held at Chicago at which some of the plaintiffs were present. Subsequent to this hearing, the Secretary of the Interior was advised of the evidence presented at the hearing. Following receipt of all the evidence and data, Proclamation 2748 was presented to the President, who signed it on October 1, 1947. On October 3, 1947, it was published in the Federal Register. (Fdgs. 4, 5, 6; R. 61-62.)

On the basis of these facts, the trial court found that the provisions of the Administrative Procedure Act, 5 U. S. C. 1001-1011, are inapplicable to Proclamation 2748, 12 F. R. 6521; that the Secretary of the Interior and the President had complied with the provisions of that Act in issuing the Proclamation; and that the provisions of Proclamation 2748 are not arbitrary or capricious but are reasonable and proper (Fdgs. 7, 8, 9; R. 62-63). For these reasons, the motion for a preliminary injunction was denied. The circuit court of appeals affirmed, holding that both the Federal and the State Proclamations were valid (R. 83-87).

ARGUMENT

Petitioners assert that some seventeen questions are presented in this case (Pet. 11-14). However,

analysis will show that most, if not all, of these matters are either irrelevant or have now become moot.

1. The hunting of geese in the area in question was prohibited by both federal and state action; hence, to establish their case, petitioners must show that both proclamations were invalid. The claim that the Proclamation of the Governor of the State of Illinois violated the State constitution (Pet. 14, 32) obviously does not present a question for review by this Court. Petitioners' further assertion that such proclamation is invalid because they have been denied due process of law under the Fourteenth Amendment to the Federal Constitution is unsupported by any authority indicating that a state is required to give notice and hearing to all persons interested before adopting regulations relating to wild game.

2. Even if some substantial question as to the State Proclamation were presented, petitioners' attack on the Federal Proclamation lacks merit. The questions whether petitioners have property rights giving them standing to sue (Pet. 11-12, 14-15, 17, 25-26) and whether the Administrative Procedure Act, 5 U. S. C. sec. 1009, gives them standing (Pet. 13, 29) are not presented here since the decision below did not rest on a conclusion that petitioners had no standing to sue. Petitioners refer to questions whether the Federal Proclamation was invalid because the procedure under which

it was adopted violated the Administrative Procedure Act and the Federal Register Act (Pet. 13-14, 16-17, 28-29, 30-31). But the Migratory Bird Act Regulations are re-issued annually (R. 11-12) and, as petitioners recognize (Pet., p. 6), Proclamation 2801, 13 F. R. 4411, which governs the matter for the current year, was adopted after notice and public procedure pursuant to the Administrative Procedure Act. Since petitioners seek an injunction against enforcement of the regulation in the area in question, whether the proclamation prohibiting hunting there in 1947 was adopted under proper procedure is now a moot question.[1]

3. There remains the single question whether the closing of the area in question was authorized under the Migratory Bird Treaty Act. The Act does not permit hunting of migratory birds except as forbidden by regulations. On the contrary, section 2 of the Act (16 U. S. C. 703) prohibits all hunt-

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[1] Petitioners' attack on the procedure by which the 1947 regulations were adopted sacrifices substance to form. As the findings of the trial court quoted by the court below (R. 84-85) show, hearings were held after notice to petitioners. The attack thereon is based on the fact that the Secretary of the Interior signed the regulation on September 25, 1947 (Pet. 8). But this ignores the fact that the definitive step of submitting the Proclamation to the President was not taken until after the hearing (R. 62). If error at all, the physical signing on the earlier date was clearly non-prejudicial. See Section 10(e) of Administrative Procedure Act, 5 U. S. C. 1009; Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 230.

ing except as permitted by regulations.[2] And section 3 of the Act, 16 U. S. C. sec. 704, authorizes the Secretary of the Interior under regulations to be approved by the President "to determine when, to what extent, if at all, and by what means" hunting, etc., shall be allowed. Petitioners argue that no permanently closed area can be established; that an area as small as 20,000 acres cannot be closed when hunting is permitted in the rest of the State; and that a closed area cannot be established on privately owned land not adjacent to a Federal refuge (Pet. 12, 15-16, 27-28). But the Act contains no such limitations. On the contrary, the Secretary is given broad discretion to determine when hunting will be permitted "if at all". This obviously includes the power to close permanently certain areas where birds congregate while permitting hunting elsewhere. *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4). The court below stated that both proclamations were "enforcement measures that were neither unreasonable nor capricious but were justified by facts developed by extensive study and investigation made by Federal and State officials charged with conservations of migratory birds" (R. 86).[3] Petitioners' claim of long-standing ad-

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[2] Petitioners do not challenge the constitutionality of the Act. See *Cochrane* v. *United States,* 92 F. 2d 623 (C. C. A. 7); *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4).

[3] Petitioners complain (Pet. pp. 17-18, 24, 30) of this statement because of the stipulation at the hearing on motion for preliminary injunction (R. 28-29). But petitioners contended that the Proclamation was arbitrary or capricious (R. 58,

ministrative construction (Pet. 27-28) is based on the fact that this was the first instance where a closed area has been established adjacent to a state game refuge rather than federal refuge. But the assumption upon which the argument is based—the fact that such authority has not previously been exercised means that it does not exist—is fallacious. There is no administrative construction that when the circumstances make it desirable, the Federal Government must take over a state refuge in order to establish a closed area surrounding it. On the contrary, the Act recognizes that state interests in such matters continue subject to paramount federal power. *Carey* v. *South Dakota,* 250 U. S. 118.

71, cf. R. 97). It was in response to this argument that both courts below concluded that the proclamation was a reasonable exercise of administratrive discretion (R. 63, 86). Petitioners apparently have the notion that the court may review the reasonableness of the regulation with reference to scientific, biological and economic facts (Pet. p. 30). But the reasonableness of the regulation in this sense, i.e., the wisdom of the determination is not subject to judicial review. *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4); Cf. *United States* v. *Carmack,* 329 U. S. 230.

CONCLUSION

The decision of the court below is correct and presents no conflict or question which should be decided by this Court.

Respectfully,

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